IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.....

M. W. ALWORTH AND R. D. ALWORTH, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF M. H. ALWORTH, DECEASED, *Petitioners,*

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.
OPINIONS

The findings and opinion of the Board of Tax Appeals are found beginning on page 10 of the Record.

The opinion of the Circuit Court of Appeals is found at page 24 of the Record.

II.
STATEMENT OF THE CASE

The case is as stated in the foregoing Petition for a Writ of Certiorari, and need not be here repeated.

III.
THE QUESTION INVOLVED

The question involved is also stated in the foregoing Petition.

IV.
SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the petitioners could not deduct the accrued 1937 Federal income tax of the Royal Mineral Association from its taxable income for that year and treat their pro rata share as stockholders of the balance only as earnings and profits included in the corporate distributions received by them.

2. The Court erred in holding that there is a deficiency in petitioners' income tax for 1937.

3. The Court erred in reversing the decision of the Board of Tax Appeals.

These assignments go to a single point and will be argued collectively.

Statutes and Regulations Involved.

The statutes and regulations involved are set out in the appendix hereto.

V.

ARGUMENT

1. Prior Decisions of This Court and of the Circuit Court of Appeals Fully Sustain the Taxpayers' Contention.

So far as we have been able to ascertain, there has been only one reported Court decision prior to this case involving directly the exact point at issue. That was the case of *Hadden vs. Commissioner,* 49 Fed. (2d) 709, handed down on May 11, 1931, by the Circuit Court of Appeals of the Second Circuit. That case involved the income of a stockholder included in corporate distributions received from a corporation making its return on the cash receipts and disbursements basis. In discussing the question, the Court said:

> "What must be determined is the amount of earnings and profits of the Coal Company which was available for distributions to stockholders on the date of the distributions. Since the earnings to each of these dates is unknown, the Commissioner is compelled to ascertain the earnings for the entire year and pro rate them. This would logically follow from the reasoning of the *United States vs. Anderson,* 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347. In applying Section 31 of the Revenue Act of 1916 (as added by Revenue Act of 1917, Sec. 1211), the court is concerned with ascertaining the amount of real earnings and profits which are available for distribution to stockholders on the date of each distribution.
>
> "There appears to be no sound reason why the current earnings or profits should not first be reduced by the amount of the tentative tax in determining the amount of the current or post March 1, 1913, earnings available for distribution of dividend. *Commissioner of Int. Rev. vs. James* (C. C. A. 2), 49 Fed. (2d) 707, decided May 4, 1931."

In *Fawcus Machine Company vs. U. S.,* 282 U. S. 375, 51 S. Ct. 144, 75 L. Ed. 397, this Court had under consideration

the determination of a corporation's invested capital. The question was between the Revenue Department and the corporation taxpayer; yet even as between those parties the Court said:

> "A corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued based on net income for the same year."

In *Commissioner vs. James,* 49 Fed. (2d) 707, said Circuit Court of Appeals of the Second Circuit had for consideration the determination of the taxable income of a stockholder included in corporate distributions received by it from a corporation keeping its books and making its returns on the accrual basis, and the Court said:

> "As the Anderson case would indicate, the true income for the year 1918 could not have been determined without deducting from the corporation's gross income for the year the total costs and expenses attributable to the production of that income during that year, and a reserve for income taxes set up in the books for the year must be deducted from the gross profits for the year before net results of operation can be ascertained."

In no case, so far as we are informed, has any Court heretofore specifically recognized or suggested any distinction, so far as deduction of Federal income tax is concerned, between distributions received from a corporation on a cash basis and such distributions received from a corporation on the accrual basis when the income of the stockholder is to be determined. As we shall undertake to show later in this brief, there is no logical basis for any such distinction.

2. Regulations Issued by the Commissioner Himself Sustain the Taxpayers' Position.

In this argument, when we mention the Commissioner, we refer to the present Commissioner, his predecessor in office, or the Treasury Department, as the case may be.

With undoubtedly full understanding and appreciation of the intention of Congress, evidenced by the wording of the various statutes referred to, the Treasury Department in Regulations 62—Income Tax, promulgated under the similar Revenue Act of 1921, provided under the general title "Definitions and General Provisions" in Article 1542, as to what distributions by a corporation should be deemed to have been made from earnings and profits, as follows:

> "In ascertaining whether or not a distribution was made out of earnings or profits of the taxable year, there should first be set aside a proper reserve for the payment of accrued income and excess profits taxes."

We do not have regulations available from which we can say definitely when the use of that exact phraseology was discontinued. We can state, however, that there is nothing in the present regulations to the contrary.

The lower Court declined to follow the rule of the Hadden case on the stated ground of "lack of reasoning." The Court evidently gave little or no consideration to the fact that the Hadden case has stood as unquestioned judicial authority for a period of nearly twelve years. No request was even made for a review of it.

3. Reasons Supporting the Hadden Case.

In view of such reference to the fact that in the Hadden case, the Court, while evidently having considered the question carefully, apparently considered it unnecessary to dis-

cuss extensively the reasons for its decision, we shall here discuss reasons which may have entered into the consideration of that Court and which, regardless of that fact, justify the ruling thereby laid down and at the same time show the error of the Commissioner's present position.

Income Taxes Are Based on Actual Income.

It is provided in Section 22 (a) of the Revenue Act of 1936 that gross income shall include dividends received; and it is provided in Section 115 (a) of the Act that a "dividend * * * means any distribution made by a corporation out of earnings or profits." There is nothing in the statute providing how earnings and profits shall be computed. It is provided, however, in Section 41-1 of the Act that if the method of accounting followed by the taxpayer does not clearly reflect his income, then the computation thereof shall be made in such manner as, in the opinion of the Commissioner, does clearly reflect such income. In discussing this subject, as covered by the like 1916 Revenue Act, the Circuit Court of Appeals in the Hadden case used the following language:

> "The Court is concerned with ascertaining the amount of real earnings and profits which are available for distribution to stockholders on the date of each distribution."

In Article 41-3 of Treasury Regulations 94—Income Tax, issued under the Act of 1936, it is provided:

> "Each taxpayer is required by law to make a return of his true income."

This Court, in *United States vs. Anderson,* 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347, in discussing a similar question, said:

> "The Appellee's true income for 1916 could not have been determined without deducting from its gross income for the year the total cost and expenses attributable to the production of that income during the year."

To the same effect, see *McKinney vs. Commissioner of Internal Revenue* (C. C. A. 10), 87 Fed. (2d) 811; *Commissioner vs. James, supra; Fawcus vs. United States supra; Harder vs. Erwin,* 285 Fed. 402.

In the Revenue Laws Congress Used the Words "Earnings" and "Profits" in Their Natural, Ordinary and Commonly Understood Meaning.

In *Commissioner vs. F. J. Young Corporation,* 103 Fed. (2d) 137, the Circuit Court of Appeals of the Third Circuit, in a case arising under the Revenue Act of 1928 in all essential respects the same as the Revenue Act of 1936, in so far as this case is concerned, said:

> "Section 115 (a) is simply a definition of the word 'dividend' and merely distinguishes between a distribution out of 'earnings and profits' and a distribution out of capital. The words 'earnings or profits,' as used therein, are words in common use, and 'are to be given their natural, plain, ordinary, and commonly understood meaning.' 59 *C. J.*, p. 975, section 577; *Miller vs. Robertson,* 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265; *DeGanay vs. Lederer,* 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042; *Lake County vs. Rollins,* 130 U. S. 662, 9 S. Ct. 651, 32 L. Ed. 1060."

The accuracy of these conclusions seems so obvious that we have made no search for other authorities.

The 1937 Actual Profits and Earnings of the Royal Mineral Association Can Only Be Accurately Ascertained by Deducting from the Corporation's Taxable Income the Tax Accrued Thereon.

Using the words "income and profits" in their natural and commonly understood meaning, the truth of the foregoing title is self-evident. If, for instance, the Royal Mineral Association had sent out a statement of earnings and profits for the year 1937, ignoring the fact of $92,552.88 accrued and unpaid income taxes thereon, stockholders and investors would have understood that to mean $92,552.88 after taxes, and any Court, if the occasion arose, would have held such statement to be fraudulent and would have held the corporation and its officers liable in damage to any investor who might have invested his money in the stock of the corporation on the strength of such statement and sustained a loss as the result thereof. Likewise, any creditor who extended credit to the corporation on the strength of such statement would have had a clear and definite cause of action on account of fraud if he had sustained damages because of having relied thereon.

If, upon liquidation of the corporation in 1939, it had disbursed to its stockholders all of its taxable income, retaining no property with which to pay those taxes in the following year, the Commissioner would have been the first to bring suit against the stockholders to recover from each of them his pro rata share of such distribution which represented the unpaid income tax on such corporate profits. He would have done so upon the ground that such receipts to the stockholders were, to the extent of the income tax unpaid, distributions of capital which the stockholder had no right to retain, either as income and profits or otherwise, and the Commissioner would have been perfectly right in

such proceeding.

The Commissioner would have proceeded under Section 311 of the Revenue Act of 1936, which provides in part as follows:

> "Section 311—Transferred Assets—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title: * * *
>
> (1) Transferees—The liability at law or in equity of a transferee of property of a taxpayer, in respect to the tax, (including interest, additional amounts and additions to the tax imposed upon the taxpayer by this title)."

The stockholders who received all the taxable income of the Royal Mineral Association for 1937 received it subject to something "in the nature of an equitable lien" in favor of the Government for the accrued and unpaid Federal income tax thereon. *In re Brezin,* 297 Fed. 300; *U. S. vs. McHatton,* 266 Fed. 602.

The corporate distributions, to the extent of such tax, never became the absolute property of the stockholders free from lien until the 1937 Federal income tax thereon was paid.

No one would question the right of the Commissioner to enjoin such distribution by the Royal Mineral Association of all its taxable income for 1937 if it appeared that there would be no property left with which to pay accrued income taxes thereon. No one will deny that if the Royal Mineral Association had disbursed all such income and had no property or income remaining with which to pay the Federal income tax thereon, the Commissioner himself could have successfully maintained action against the stockholders to recover the tax; *but* we respectfully submit that no one

could deny that any such action on the part of the Commissioner would be entirely inconsistent with his present contention that the entire amount of such distributions received by the stockholders was taxable income to them.

The Royal Mineral Association Having Disbursed All Its Taxable Income for 1937 Without Payment of the Accrued Income Tax Thereon the Amount of That Tax Became a Capital Charge.

It is provided in Section 22 (d) of the Act that "distributions by corporations shall be taxable to the shareholders as provided in Section 115." Section 115 provides generally that the term "dividend" means any distribution made by a corporation to its shareholders out of earnings or profits. If "earnings or profits" were interpreted to mean the taxable earnings or profits of a corporation, and if a corporation disbursed all of such taxable profits each year to its stockholders, there would gradually be a complete distribution of all the capital of the corporation and the shareholders would be required to pay income taxes on the whole thereof. This admittedly was not the intent of Congress. The Commissioner freely admits that stockholders have the right to deduct such corporation Federal income taxes at some time. What Congress did intend was that only so much of the profit of a corporation as remained after deducting Federal income taxes thereon should be considered as income and profits of the stockholders individually when distributed to them. When all the taxable profits of a corporation are distributed to its stockholders, then that part thereof equal to the income tax thereon is a return of capital to the shareholders and not taxable income.

It is only because the Royal Mineral Association had available each year for distribution to its stockholders a substan-

tial amount of depletion that it could disburse its entire taxable earnings. Even then, if it had had heavy creditors, they could have objected to such large distributions. Under the actual circumstances existing there was presented each year to the shareholders the problem of determining how much of the distributions received by them constituted income and how much depletion or return of capital.

Without discussion thereof, we commend to the Court the opinion of the Board of Tax Appeals, as found at page 10 of the Record that to permit a distribution of gross earnings and profits without making allowance for outstanding obligations would leave such obligations a charge on capital regardless of the method by which the corporation keeps its books or reports its income for Federal income tax purposes.

Income Tax Returns on Cash Receipts and Disbursements Basis Often Impossible or Inaccurate.

It was early recognized that it is often impossible for a taxpayer to make a truly satisfactory income tax return on the cash receipts and disbursements basis. For that reason, the law was amended in 1916 to provide for such returns on the accrual basis, and "the return must be filed on the accrual basis" where true income cannot be arrived at on the basis of actual receipts and disbursements. *Aluminum Castings Company vs. Routzahn,* 282 U. S. 92, 51 S. Ct. 11, 74 L. Ed. 601.

4. The Commissioner's Position—Errors Therein.

The Commissioner's only answer to all the foregoing reasons supporting the taxpayers' contention is (quoting from his Brief in the Circuit Court of Appeals):

"In the instant case, there is no question that the

> Royal Mineral Association was on the cash receipts and disbursements basis of accounting. It used this method in arriving at the amount of its net income for 1937, and we submit that the same method should be used in determining the amount of taxable dividends distributed by it."

His theory seems to be that as the corporation may not deduct from its gross income its accrued but unpaid expenses or Federal income tax in determining and returning its own taxable income, neither such corporation nor its stockholders may make such deduction for any purpose or in any computation whatsoever. This, we maintain, is contrary to the conclusion reached in the Fawcus case and other cases, *supra*. He claims that such action on the part of the stockholders would result in some forbidden inconsistency.

We direct the Court's attention to several considerations which we believe the Commissioner ignored in arriving at the above stated conclusions.

The Commissioner apparently ignored the fact that all the statutory provisions and Department regulations above referred to are applicable only as between the Revenue Department and the taxpayer in the determination of the taxpayers' taxable income. Such regulations and statutes have no bearing on the determination of a corporation's net income or profits as between it and its stockholders or the investing public. As between them, accrued income taxes are always considered and deducted in arriving at the corporation's "net income." As applied to this particular case, the statutes and regulations were intended to provide for the determination of the true income of the Royal Mineral Association and for the taxation thereof. They were also intended to provide, as between the Revenue Department and the stockholders as entirely different entities, for the determination and taxation of the true taxable income of such

stockholders. The taxable income of the corporation before deduction of taxes thereon does not represent income of the stockholders, who can receive as true income at most only what is left of the corporation's earnings after the corporation's income tax thereon is deducted.

The computation and return of the corporation's income tax may when accepted by the Department be final and binding as between the Department and the corporation. They are not, however, binding as between the stockholders and the Revenue Department. This is well illustrated by the case of *Wells Fargo Bank & Union Trust Company vs. U. S.*, 78 Fed. (2d) 934. In that case, the Wells Fargo Company was permitted to show, for the purpose of determining its own taxable income, that the corporation had made excessive allowances for depletion, as a result of which a part of the corporate disbursements received by the stockholder under the designation of "dividends" was in fact return of capital. Identically the same rule was followed by the Board of Tax Appeals in the case of *Irving vs. Robeson,* 18 B. T. A. 323.

It is true that if a taxpayer adopts either the cash or the accrual basis for determining and returning his income and taxes thereon, he must be consistent and if he adopts the accrual basis, he must include all accrued but uncollected earnings as well as accrued but unpaid expenses. The cases are unanimous on this point. When the word "accrued" is used in this connection, the meaning is accrued or incurred in fact, regardless of book entries. No taxpayer, for instance, on the accrual basis can avoid reporting as income earnings and accounts payable merely because they have not been entered on his books. *Mitchell vs. U. S.*, 271 U. S. 9, 46 S. Ct. 418, 70 L. Ed. 799; *U. S. vs. Anderson, supra; Niles Bement Pond Company vs. U. S.*, 281 U. S. 357, 50 S. Ct. 251, 74 L. Ed. 901; Article 115-3, Income Tax Regulations 94, *supra.*

Of course, it is a fact that it may not be possible for every corporation to determine at the end of the calendar or fiscal year just exactly what its Federal income tax will be, and such tax has not yet been formally levied, and under such circumstances, cannot be entered on the books before the close of the year. Nevertheless, it has been held by this Court that when such tax is finally determined it may be accrued on the books as of the year involved. *Aluminum Castings Company vs. Routzahn, supra.* This is impliedly admitted by the Commissioner in his admission that if the Royal Mineral Association had been on the accrual basis the taxpayers' theory would have been proper in this case.

The Commissioner overlooks the fact that there is nothing in the statutes or regulations which requires one taxpayer to make his income tax returns on either the cash or the accrual basis merely because some other taxpayer makes its returns on that basis. Every taxpayer has a right under the statutes to select his own method of computing and returning his taxable income, provided only such method properly used is sufficient to determine his true income for taxation purposes. As we have seen, not even the corporation's return of its own taxable income is binding on the stockholders. Moreover, the obligation to pay the accrued Federal income tax on such corporate income is that of the corporation itself and not the stockholders. Some stockholders are doubtless on the accrual basis and some on the cash basis. Yet, no one will contend that if a stockholder were on the accrual basis, he should be permitted to deduct the corporation's Federal income tax while the same privilege should be denied to a stockholder on the cash basis.

Corporations Never Deduct Their Own Federal Income Taxes in Determining Their Own Income.

The Commissioner ignores the fact that so far as Federal income taxes are concerned, it makes no difference whatsoever in the computation of the taxable income of a corporation whether it computes and returns its taxable income on the cash or on the accrual basis. A corporation never deducts Federal income taxes in computing its taxable income. Such taxes are never treated as an expense such as cost of labor or material in computing income either on the cash or accrual basis. Section 23 of the Act provides in part:

> "In computing net income there shall be allowed as a deduction * * *
>
> (c) Taxes Generally—Taxes paid or accrued within the taxable year *except* (1) *Federal income,* war profits and excess profits taxes." (Italics ours.)

So the Royal Mineral Association, in computing its taxable income, deducted neither the accrued income tax thereon for the year 1937, nor that for the year 1936 paid in 1937. Under these circumstances, if the Commissioner carried his argument to its logical conclusion that the stockholder must follow the same method as the corporation, he would be forced into the position that as the Royal Mineral Association did not deduct any Federal income tax in making its own return, it follows that the stockholder cannot deduct any such taxes. As we have seen, however, he necessarily and freely concedes that such a conclusion would be inaccurate and contrary to the intent of the statutes and regulations, when he admits that the petitioners may deduct the 1936 income tax paid by the corporation in 1937. As a corporation never deducts its income tax in computing its own taxable income, the question of when such tax may be deducted in computing the income of the stockholders is one

arising and existing solely between the Revenue Department and them, and we respectfully submit there is no logical reason for making the answer to that question depend on whether the corporation makes its returns on the cash or on the accrual basis.

Moreover, the treatment of income taxes of a corporation differs from the determination and treatment of the income tax of the stockholders in other respects. For instance, in said Article 115-3, Regulations 94, promulgated under the Act of 1936, it is provided:

> "Among the items entering into the computation of corporate earnings or profits for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112 or corresponding provisions of prior Acts are brought into the earnings and profits at the time and to the extent such gains and losses are recognized under that section. *Interest on State bonds and certain other obligations, although not taxable when received by a corporation, is taxable to the same extent as other dividends when distributed to shareholders in the form of dividends.*" (Italics ours.)

5. Discussion of the Opinion of the Lower Court.

The lower Court apparently found other reasons besides the mere fact that the Royal Mineral Association was on the cash basis for reversing the Board of Tax Appeals, and we wish to discuss some features of that opinion, in which we respectfully contend the Court fell into grievous errors.

The Court said:

> "The contention of the taxpayer, sustained by the decision of the Board, imputes to Congress an intent to exempt from taxation dividends paid to stockholders from current earnings or profits during a taxable year

> to the extent that the tax on the corporation's income for the taxable year *exceeds* its income tax for the preceding year, unless at the close of the taxable year the corporation has an earned surplus or a reserve sufficient to pay such taxes when levied and payable in the succeeding year. For, applying the rule to stockholders in a corporation on a cash basis whose income tax varies in amount from year to year, the excess of income tax on the corporation's income in one year over its income tax in the preceding year will be exempt to the stockholders from income taxes to the extent of such excess."

We respectfully submit that statement to be grossly involved and misleading. The taxpayers' claim does not in any way involve any consideration of any income tax for the preceding year. The taxpayers' contention simply is that from the taxable income of the corporation for any year when all such income is distributed to its stockholders must be deducted the income tax accrued thereon in order to determine how much of those distributions received by the stockholders constitutes income to them. The Commissioner's claim is equally simple. It is that instead of deducting accrued Federal income tax on the income for the year in question, the stockholders can only deduct the tax paid during that year on the corporation's taxable income for the previous year. The lower Court would make the petitioners' claim appear complicated and involved instead of simple and clear, as it really is.

The lower Court has in some way confused the two claims. Possibly it has overlooked the fact that the instant case is complicated by the Commissioner's proposed change of methods and the fact that he offers to permit the stockholders to deduct from the taxable income of the corporation in 1937 its 1936 income tax paid in 1937, notwithstanding the fact that the stockholders, in accordance with their customary practice, have already deducted such 1936 income

tax in returning their own income for that year and make no affirmative claim to the benefit of the 1936 tax deduction offered by the Commissioner. Incidentally, if the Commissioner's new method be sustained by this Court, he will naturally claim that the stockholders' return for the year 1936 was erroneous because of the fact that they had deducted the amount of the 1936 income taxes of the corporation, which they had no right to deduct until 1937. In such event, he would naturally make a deficiency levy and undertake to collect it, provided only the 1936 income tax of the corporation was larger than its 1935 income tax. The Commissioner would thus continue to levy deficiency taxes for as many years back as permissible under the statute of limitations.

The Court says:

> "In the instant case, the difference between $92,552.88 and $30,606.76, or $61,946.12 of the earnings distributed by the corporation in 1937, although actually received by the stockholders during the taxable year, would be exempt from Federal income taxes."

We claim that not only the $61,946.12 but the entire $92,552.88 is exempt from Federal taxation against the stockholders. The Commissioner admits the accuracy of that claim. The only difference between us is as to the year in which such $92,552.88 may be deducted by the stockholders from their corporate distributions received.

The Court said:

> "The taxpayer's theory grafts upon the statute a condition or limitation based upon the assumption that Congress in providing that a taxable dividend 'means any distribution made by the corporation to its stockholders * * * out of the earnings or profits of the taxable year' implied the condition: 'if there are such earnings or profits remaining after deducting federal taxes for the taxable year.' To read into the statute

> such an implied condition is equivalent to amending it; and neither the Board nor this court can so amend the Act. Congress alone has power to do so."

In making that statement, the Court demonstrated that it failed to differentiate between corporate distributions received by a stockholder and income received by him. The Court has apparently adopted the theory that all taxable income of the corporation distributed to a stockholder is income to him. The Court refers to the "implied condition: *if there are such earnings or profits* remaining after deducting federal taxes for the taxable year." The Court suggests the idea that all of the corporation's earnings for any year might be consumed in income taxes thereon, a contingency of course not possible under any heretofore existing income tax laws.

The Court further said:

> "It was not the purpose of the Act to permit gross income actually received by the stockholder to be diminished by taxes neither accrued nor paid by the corporation in the taxable year, even though imposed upon the earnings of that year."

We do not have here any question as to deductions from gross income received by a stockholder. We do have a question of what constitutes gross income received by a stockholder, and in the foregoing statement the Court begs the question by assuming all corporate distributions received by him to be gross income.

The Court says:

> "The Board, in its opinion, reads into this statutory definition of 'dividend,' the general law relating to the right of a corporation to declare dividend. Section 115 (a) does not refer to the power of the corporation to distribute its earnings to its stockholders; that section relates only to what the stockholder must include in his 'gross' income."

We understand the Board refers to the general law only for the purpose of determining what are "earnings" and "profits" within the meaning of Section 115 (a) which the shareholder must include in his gross income. Such meaning must be ascertained from a consideration of general law and general understanding. The statute does not define the words.

The Court finally says:

> "The purpose of the Revenue Act of 1936 was to require returns that clearly reflect taxable income * * *. The purpose of the Act can be accomplished in such a case, only by using the method of computation followed by the commissioner in this instance."

Surely grave doubt upon the accuracy of that conclusion must arise from the fact that stockholders of the Royal Mineral Association used the exact method of computation advocated by these taxpayers for twenty years without protest, and that it was not until the year 1937, so far as such stockholders were concerned at least, when the Commissioner adopted his new theory with the result of imposing upon these taxpayers heavy additional tax. If the Court's conclusion was correct, it would seem that the Commissioner might have discovered that fact before 1931 and might have asked for a review of the Hadden case. If the method advocated by these taxpayers were complicated and involved, as the lower Court seems, from its statement first above quoted, to assume, there might be a justification for the Court's conclusion; but simple as the petitioners' theory is, it suggests to us no difficulty whatsoever in its application.

CONCLUSION

We respectfully submit that the Writ should be granted and the decision of the lower Court should be reviewed, to the end that it may be reversed and the proper rule laid down for application uniformly throughout the country.

All of which is respectfully submitted,

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